IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 135 of 1997

For Approval and Signature:

THE HON'BLE MR.JUSTICE M.S.SHAH

HON'BLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HARIJAN JIVRAJ VAGHA - Petitioner(s)
Versus
STATE OF GUJARAT - Respondent(s)

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== **Appearance :**
MS SADHANA SAGAR, for Petitioner No(s).: 1.
MR AJ DESAI, APP for Respondent No(s).: 1.

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CORAM : HON'BLE MR.JUSTICE M.S.SHAH
HON'BLE MR.JUSTICE BANKIM.N.MEHTA

Date : 20/06/2005

ORAL JUDGMENT (Per : HON'BLE MR.JUSTICE M.S.SHAH)

This appeal is directed against the judgment and order dated 31.1.1997 of the learned Sessions Judge, Junagadh convicting the appellant herein (original accused No. 2) in Sessions Case No. 52 of 1995 of the offences punishable under Section 302 IPC and sentencing the appellant to suffer life imprisonment and to pay a fine of Rs.500/- (in

default RI for two months). The charge against the accused was that with intention to cause death of Bai Bhanu @ Balaben when she was passing by the road near the Government Dispensary at Talala, the appellant had caught hold of Bhanu (deceased) and inflicted knife injuries on her. The accused was, therefore, also charged with the offence punishable under Section 135 of the Bombay Police Act.

2. The prosecution case was that accused Harijan Jivraj Vagha and the deceased had earlier eloped and thereafter the deceased had come back to her parents' place. The appellant had, therefore, filed a case in the Court at Rajkot and in the proceedings, the deceased had refused to go back with the appellant. The appellant was, therefore, enraged against the deceased. The deceased and her sister, complainant-Manjulaben, had gone to the river near the town for washing clothes and when they were returning and when they reached near the Government Dispensary, the appellant went near the deceased, caught hold of her and took out a knife from his trousers and inflicted knife blows on the head, right hand side of the chest, left hand side of the chest, stomach and on the back of the deceased and also on her left thigh. When complaint – Manjulaben tried to intervene, the appellant tried to assault her also by catching hold of her wrist and when the complainant managed to get herself released and shouted, the appellant fled with his knife. Two brothers of the accused were charged with the offence punishable under Section 302 read with Section 144 IPC, but since the said brothers are acquitted of the charge as even according to the complainant, accused Nos. 1 and 3 had not played any role, we are not required to deal with that part of the prosecution's case.

3. The appellant pleaded not guilty and the prosecution led evidence mainly consisting of eye witness account of PW 9 Manjulaben at Exh. 35 (Page 139) who had filed the First Information Report within half an hour from the time of incident on 29.1.1997 itself [Exh. 36, Page 137]. The prosecution also examined the mother of the deceased PW 8 Prabhaben at Exh.34 and PW 11 father – Lavabhai Polabhai at Exh. 38 (Page 155). The prosecution also examined Dr Dhirajlal Laljibhai Dumar, Medical Officer of the Community Health Centre, Talala who carried out the post mortem on the body of the deceased, post mortem report at Exh. 24, the FSL report at Exhs. 18 and 19, panchas of the panchnama regarding the arrest of the appellant and the seizure of the clothes of the appellant with blood stain marks and also the panchas for the inquest panchnama as the clothes worn by the deceased were also bearing blood stain marks of bearing blood group “A” which was the blood group of the deceased.

The defence of the appellant was that of total denial. The appellant had also defended in the cross examination of the witnesses of the family members that the deceased was not allowed to go with the appellant and that she was forcibly being detained by her parents.

4. After considering the evidence on record, the learned Sessions Judge convicted the appellant for the offence punishable under Section 302 IPC, but acquitted his brothers who were accused Nos. 1 and 3 of the said charge as ,even according to the prosecution case, accused Nos. 1 and 3 were also hiding themselves when accused No. 2 i.e. the appellant herein ran towards the deceased and assaulted her and inflicted knife blows on her. Original accused No. 2 is, therefore, in appeal before us.

5. Mr Sadhana Sagar, learned counsel for accused No. 2 has submitted

that when the deceased had gone with the appellant on her own free will and married him, the appellant was justified in being enraged at the act of the parents of the deceased of marrying her to a person called Vinodbhai and that the appellant had no intention of causing death of the deceased, but on account of her refusal to go back with him, the accused had inflicted knife blows on her and there was no premeditated plan to cause death of the deceased.

6. Mr AJ Desai, learned APP for the State has supported the judgment of the learned Sessions Judge and submitted that it was not that the appellant had gone to the house of the deceased to persuade her to go back with him, but the appellant had assaulted the deceased when she was returning from the river after washing clothes with her sister and the appellant was already carrying a knife with him with the intention to cause death of the deceased.

7. We have given anxious considerations to the submissions made by the learned counsel.

In the first place, the incident in question was witnessed by none other than PW 9 Manjulaben, the elder sister of the deceased (Exh. 35). Her eye witness account is quite natural and the defence was not able to make any dent on the version of the said eye witness. An attempt was by Ms Sagar to show that the fact that the two brothers of the appellant were also arraigned as accused would show that the complainant-sister of the deceased was not a truthful witness for lending any support to such defence theory. The complainant-sister of the deceased had stated that accused Nos. 1 and 3 were hiding themselves near the Government Dispensary and that after the appellant inflicted knife blows on the

deceased and started fleeing, accused Nos. 1 and 3 also started running. The witness was, therefore, not at all interested in falsely roping in accused Nos. 1 and 3. The learned counsel for the appellant is not in a position to show why Manjulaben, elder sister of the deceased would make a false accusation against accused Nos. 1 and 3 with the offence of committing murder of her younger sister and would allow the real assailant to go scot free.

The parents of the deceased PW 8 Prabhaben, Exh. 35 (Page 135) and PW 11 Lavjibhai Polabhai, Exh. 38, although not eye witnesses to the incident, have clearly given evidence for the motive of the appellant in causing death of the deceased. According to both the witnesses, after the deceased had eloped with the appellant, the parents had lodged a complaint in the Talala Police Station and that thereafter the deceased had sent a chit to the parents complaining about the harassments being caused by the appellant to the deceased and requesting for bringing her back to the parental home. Three-four days after receiving the chit, the father of the deceased had brought her back and taken her to the residence of their relative Dr Pravinbhai at Ankolwadi and requested Dr Pravinbhai to find out a good match for the deceased. Thereafter, the appellant had lodged a complaint with the Rajkot Police Station and upon receiving summons from the Court of the learned Magistrate at Rajkot, the father had gone to the Court and shown the chit written by the deceased. Hence, the Court at Rajkot had granted the custody of the deceased to the parents and the father had taken the deceased to Ankolwadi. About ten days before the date of incident, the deceased was married to Vinodbhai Patel at Junagadh and thereafter the deceased was brought to Ankolwadi by the brother of the deceased and Dr Pravinbhai as per the custom of the community (known as *anu* ceremony). One day before the date of incident, the

deceased had come to the parental home at Talala. Both the deceased and her elder sister PW 9 Majulaben had gone to the river of the town for washing clothes and when they were returning, the appellant caught hold of the deceased and inflicted as many as 12 knife blows on her which are as under :-

1. Incise wound on Rt. Perital region or scalp. 5 cm x 1 cm x B. Deep. Oblique in direction from Rt. to Lt.

2. Abrasion on Lt. Nostril 1 cm x 0.5 cm

3. Abrasion on center or forehead 1 cm x o.5 cm

4. Penetrating wound on Rt. Brest lower & inner region at 4th center control space. 4 cm x. 1 cm x cavity deep (thoracic cavity). Oblique in direction about downwards.

5. Penetrating wound on Rt. hypochondrium 4 cm x 1 cm x Abdominal cavity deep oblique in direction Rt. to Lt in direction.

6. Penetrating wound on Lt. Side of chest, just below the brest and laterally at 6th inter control space 4 cm x 1 cm x cavity deep (thoracic cavity), oblique in direction and above downwards.

7. Incise wound 7 cm x 4 cm x M. deep on Rt. upper arm 10 cm below Rt. shoulder, outer side transverse in direction.

8. Abrasion on Rt fore-arm at middle 1/3rd posterial aspect, 3 cm x ½ cm in size.

9. Incise would 4 cm x 1 cm M. deep in Rt. scapular region or back, Oblique in direction above downwards.

10. Incise wound 3 cm x ½ m x M. deep on Rt. infra scapular region or back. Oblique in direction above downwards.

11. Incise wound 3 cm x 1 cm x S. deep on Rt. lumber region or back. Oblique in direction about downwards.

12. Incise wound 2 cm x ½ cm x S. deep on Lt. thigh laterally at 1/3rd region.

The number and intensity of the knife blows on the vital parts of the body of the deceased and the fact that this was done in a public street and without making any entreaty to the deceased to return with the appellant

clearly go to show that there was no question of any grave or sudden provocation being given by the deceased. It was not the defence case that the appellant had gone to the house of the deceased and pleaded with her to return with him and upon her refusal, the appellant picked up the knife from the house of the deceased. The appellant had approached the deceased in a public street with a knife carried by him and as soon as he saw her, the appellant went near the deceased, caught hold of her and started inflicting knife blows on the deceased as per unimpeachable eye witness account of Manjulaben, the elder sister of the deceased. In light of these facts on record, it is not possible to accept the submission made by the learned counsel for the appellant that the case would not fall under Section 300 IPC. It is also not possible to accept the submission of the learned counsel for the appellant to take the case of the appellant out of Section 300 IPC and even to place in under Section 304 IPC.

8. In view of the above, the submission made by the learned counsel for the appellant to reduce the sentence would also be of no avail as once the offence punishable under Section 302 IPC is made out, life imprisonment is the minimum sentence and, therefore, it is not possible to accept the contention to reduce the sentence.

9. The appeal is accordingly dismissed.

[M.S. SHAH, J.]

[BANKIM N. MEHTA, J.]

sundar/-